IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SEAN ANTONIO KING — APPELLANT

VS. — NO. 2005-KA-00916-COA

STATE OF MISSISSIPPI — APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Appellant, Sean King, requests oral argument because the case is complicated and oral argument would benefit the Court by clarifying the facts and law.

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STATEMENT OF THE CASE

Since the State does not particularly dispute King's version of the facts, King will not reiterate them here but will refer the Court to his initial brief. He will discuss any incidental disputes in the individual propositions.

SUMMARY OF THE ARGUMENT

Contrary to the State's contention in its brief, the State repeatedly introduced as substantive evidence numerous statements of witnesses which it then called upon the jury to use as substantive evidence to convict King.

As for any assignment of errors which the State claims are procedurally barred, prosecutorial misconduct and overreaching in this case were so persistent and continuous that there was no practical way for counsel for the defendant to object to all of them. Notwithstanding the existence of any procedural bar alleged by the State with regard to certain propositions, the errors were such that this Court should recognize them as plain error because they had a substantial impact on important legal and constitutional rights of the accused.

Whether viewed separately or cumulatively, the result of the many errors and confusing testimony regarding prior inconsistent statements is that King was denied a fair trial. Because the only direct substantive evidence that King was the shooter came from an alleged out-of-court unsworn identification by the much-impeached Clifton Summers, the errors had a serious impact on the ability of the jury to fairly judge King's guilt and were not harmless. Mr. Summers' out-of-court identification contradicts an earlier statement and sworn trial testimony. In addition, one of the trial witnesses, Derrick Fields, positively identified another person both in an out-of-court identification procedure and in his sworn trial testimony. Unlike Summers, his out-of-court statements were all consistent in denying that King was the perpetrator.

ARGUMENT

I. THE PROSECTION COMMITTED REVERSIBLE ERROR WHEN IT INTRODUCED PRIOR INCONSISTENT STATEMENTS OF NON-PARTY WITNESSES WITHOUT SHOWING SURPRISE OR UNEXPECTED HOSTILITY.

Although the admissibility of evidence generally rests within the discretion of the trial court, a trial court abuses its discretion where its decision to admit evidence results from legal error. In that case, a *de novo* standard of review applies. *Jones v. State,* 856 So.2d 389, 393-94 (Miss.App. 2003). In this case, at the insistence of the State, the trial court misapplied Rule 611(c), the rule allowing leading questions, and allowed the State to introduce prior inconsistent statements to "impeach" witnesses.

Unsworn prior inconsistent statements hearsay, and, as such are generally inadmissible as substantive evidence of an accused's guilt.[1] M.R.E. 801(d)(1)(A). Such statements, however, may be used for the sole purpose of impeaching a witness' credibility where the witness takes the stand and testifies on a material matter in a way that is different to his statement. The right to impeach such a witness, however, is subject to two important qualifications: (1) that the person calling the witness establish that the witness has proved to be "unexpectedly hostile"; and (2) that he is "genuinely surprised by the witness' contradictory testimony. The reason for these limitations is to make sure that a party, in this case the State, does not call a witness for the sole purpose of impeaching the witness with a statement which would otherwise be inadmissible.

Where the witness' repudiation of his prior statement is well known to the State's attorney prior to the time the witness is called to testify, there is in fact and in law no surprise-and hence the State's attorney cannot and may not claim surprise. *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984); *Wilkins v. State*, 603 So.2d 309 (Miss. 1992). Put another way, "[s]urprise can be shown if the testimony is

[1] One exception is that a prior identification may be admissible as substantive evidence where the person making the identification had an opportunity to view the person being identified. M.R.E., 801(d)(1)(c).

materially inconsistent with the prior written or oral statements and counsel did not have reason to believe that the witness would recant when called to testify." *State v. Holmes*, 506 N.E.2d 204, 207 (Ohio 1987).

Where a defendant is convicted on the basis of unreliable hearsay evidence, his due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation are violated. Unreliable statements do not satisfy the constitutional demands for admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990).

This Court has a long-standing prohibition against a party calling a witness, claiming surprise and then seeking to "impeach" that witness with allegedly prior inconsistent statements and then using those statements as substantive evidence.

The State argues, however, that the State committed no error, much less reversible error, when it did so with witnesses in this case. The State's principal argument on appeal, as it was in the trial court, is should be allowed to call a witness to the stand and begin to cross-examine that witness by asking the witness about his prior inconsistent statement before the witness has testified to anything which would actually contract the statement. Rule 611, M.R.E., relied on by the State is not quite that expansive; nor does the State cite to any cases which so hold for the obvious reason that none do. While Rule 611 allows a party to ask leading questions a hostile witness, the text says nothing about asking leading questions about prior inconsistent statements.

The law is also well established that prior to introducing any evidence of a prior inconsistent statement, the witness must testify at trial to something that is inconsistent in a material respect from what is contained in the prior statement. Moreover, *Moffett v. State, supra; Wilkins v. State, supra.* Likewise well established is the principle that the prosecutor cannot encourage the jury to use such statements as substantive evidence. *Moffett,* 456 So.2d at 19-20.

Illustrative of the faulty reasoning of the State's argument for admission is the witness Willie McCarty, aka Cash Money. The State says it was entitled to introduce testimony about the entire statement of McCarty because he testified on direct that he did not know if Marcus Collier was the owner of the shop, Boyz on the Main. What the materiality of who owned the shop is, the State does not explain.[2] In any event, the inconsistency was explained when McCarty testified he knew Collier by the name "Squirt." Tr. 417-18.

The State also contends that it was proper to impeach McCarty with his statement because he denied that Clifton Summers had gone with him to the shop that day. When confronted with his statement that Summers had, McCarty explained that in the statement he was talking about the first time he went there, not the second time when he did not. Again, the materiality of this is not readily apparent since whether Summers went the first or second time, is not material. *Id.*

On the basis of these doubtful inconsistencies, the State argues that it was then proper for the court to declare McCarty "hostile" and not only cross-examine him, but cross-examine him as if he had testified contrary to all the matters in the statement, not just the two noted. That this procedure is improper is so well established and covered in Appellant's Brief as to require no further discussion. The State cites no case authority whatsoever for the proposition that confronting a witness with his prior statement and then asking, "didn't you say that" is proper for the reason that there is none.

As to Derrick Fields, the State argues that it was proper to question him about his prior inconsistent statement because he testified that he remembered seeing a black Expedition or Explorer at Boyz on the Main on the day in question. When confronted with evidence that he had said Expedition rather than Explorer, Fields admitted that he had said Expedition. The State went far beyond merely this inconsistency as King showed in his initial brief.

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[2] The ownership of Boyz on the Main was not only undisputed but also irrelevant.

As for James Russell, the so-called inconsistency in his testimony concerns a statement he made to the police regarding an alleged threat he had received. The State argues that it was proper to allow him to testify about his prior inconsistent statement because the State was surprised by his testimony about whether or not King had made the threat. Russell testified at trial that he had received threats from someone on the street. That argument does not even pass the laugh test. First of all, counsel for the State was aware prior to the time he testified that he intended to deny that King had threatened him. Therefore, the State's "surprise argument" is disingenuous. *Moffett v. State,* 456 So.2d at 719 [where state knew prior to trial that witness had recanted his statement, state could not claim it was surprised].

Secondly, evidence of the alleged threat was collateral.[3] Evidence is collateral when it does not tend to advance the charge. The State gives no reason why it should have been allowed to impeach on the collateral threat issue. *White v. State*, 532 So.2d 1207, 1217 (Miss. 1988). The prosecution, however, argued that because Fields had in fact been threatened, his testimony exculpating King should be disregarded. In other words, the prosecution used the prior statement where Fields allegedly stated he had been threatened as substantive evidence that a threat had in fact been made by King. The jury would have indeed had to be mentally athletic to make the tortured distinction between what the statement was correctly admitted for and what the prosecution used it for.

The only reason the State wanted to introduce hearsay evidence about threats to any of the witnesses was to argue the truth of the alleged threats and to ask the jury to infer that Russell would have otherwise incriminated King.

As for Clifton Summers, the prosecution had been provided with a statement of Summers recanting his prior statements. Therefore, the State could not even arguably have been surprised when he denied his statements on the stand.

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[3] Similarly collateral and immaterial is whether or not Russell gave three statements rather than two. The only thing Russell denied was telling police he recognized Sean King so that whether he made one statement or ten thousand is irrelevant.

The State does not even attempt to justify calling Rodney Clark's testimony. The State could hardly make a credible argument that it was surprised that Clark was not going to incriminate King. Clark himself made it clear to the prosecution that he had recanted his prior statement. Again, here calling Clark was a not too well disguised ploy to introduce evidence suggesting King was hanging out with disreputable characters and that Clark would have incriminated King if he was not afraid of King. The prosecution then argued that this showed King was guilty.

To summarize, while Rule 607 permits impeachment of a witness by prior inconsistent statements; it does not allow the introduction of such statements unless they are relevant to a non-collateral issue and unless they can pass through the test of M.R.E., Rule 403 that they are more probative than prejudicial. *Hansen v. State,* 592 So.2d 114, 134 (Miss. 1991); *Heflin v. State,* 643 So.2d 512, 517-18 (Miss. 1994) [cases cited at 517-18]. The prosecution emphatically may not call a witness, as it did here, and under the guise of impeachment introduce otherwise inadmissible hearsay in the form of prior inconsistent statements without first showing unexpected hostility or surprise. *Moffett v. State, supra; Wilkins v. State, supra.* Nor may it exhort the jury to use such statements as substantive evidence. *Moffett,* 456 So.2d at 19-20.

In King's case, any argument that the State was surprised that its witnesses were going to repudiate their statements to police or that they were "unexpectedly hostile" is simply disingenuous. As this Court stated in *Moffett v. State,* 456 So.2d at 719:

> On the other hand, where the witness' repudiation of his prior statement is well known to the State's attorney prior to the time the witness is called to testify, **there is in fact and in law no surprise-and hence the State's attorney cannot and may not claim surprise.** *Hall v. State*, 250 Miss. 253, 263, 165 So.2d 345, 350 (1964); see *Allison v. State*, 447 So.2d 649, 650 (Miss.1984) (state must establish that it was taken by surprise); *Young v. State*, 425 So.2d 1022, 1028 (Miss.1983) ("evidence indicating surprise" necessary); *Gardner v. State*, 368 So.2d 245, 248 (Miss.1979) ("unexpectedly hostile"); *Hooks v. State*, 197 So.2d 238, 239-40 (Miss.1967) (must show that evidence has "taken him by surprise); *Rutland v. State*, 170 Miss. 650, 653-54, 155 So. 681, 681-82 (1934) (must be a situation where prosecutor was "deceived or mislead by fraud or artifice") [emphasis added].

See also, Moore v. State, 755 So.2d 1276, 1280 (Miss. App. 2000) [plain error to allow out of court statements to be used as substantive evidence].

Not only then was the prosecution's method of introducing the prior inconsistent statements flawed, the State failed to satisfy the foundation requirements for admission of the statements—surprise or unexpected hostility. That the prosecution intended that the jury use the statements as substantive evidence is incontrovertible. *See, following discussion on the prosecution's use of statements.* The prosecution's primary purpose in calling the witnesses and introducing the prior inconsistent statements was to put inadmissible hearsay before the jury in the guise of impeachment evidence and to do it in such a way that the jury would be so confused that they could not sort through which evidence was substantive and which merely impeaching. The admission of the statements was reversible error.

The errors complained of here affect the constitutional right of the accused to a fair and impartial trial. The defendant is entitled to another trial regardless of the fact that the evidence on the first trial may have warranted the verdict that the jury returned. *Hawkins v. State*, 224 Miss. 309, 330, 80 So.2d 1, 11 (Miss. 1955). *See, discussion on harmless constitutional error in Proposition II, which is equally applicable here.*

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PROSECUTION TO USE THE IMPEACHING STATEMENTS AS SUBSTANTIVE EVIDENCE.

In response to King's argument that the prosecution used the prior inconsistent statements as substantive evidence, the State says only that "there is no indication in the record that they were used as such in the case at hand." Appellee's Brief, p. 11. That claim is belied by the prosecution's questions and arguments specifically cited in Appellant's brief. For example, even the Assistant District Attorney Rebecca Wooten argued that the statements were substantive evidence: By Rebecca Wooten

Mansell: "Your Honor, **every statement** that these witnesses made are [sic] substantive evidence . . . [emphasis added]. Supp. Tr. 78.

King in his initial brief cited just a few of the examples where the prosecution used the statements as substantive evidences[4] and will not repeat all of those since the State makes no attempt to show that the prosecution did not so argue. With regard to the prior inconsistent statements, the prosecutor argued in closing: "[T]hey all changed their statements, **but when they finally gave the truthful version, they *all* said it was Sean King**. Derrick Fields said Sean King. Willie McCarty said Sean King. Clifton Summers [emphasis added]." Tr. 1101. Not only is this argument a reference to the prior inconsistent statements, the prosecutor's argument is untrue or at best is a reference to his unsworn testimony.[5] The only person who said it was Sean King even in an unsworn pretrial statement was Clifton Summers.

In short, the prosecution repeatedly argued that the jury should find that in all of the witnesses in their prior inconsistent statements had said Sean King killed Brooks and that the jury should base its verdict on those statements. There can be no doubt whatsoever that the State told the jury to use the prior inconsistent statements as substantive evidence to convict King.

The State next argues, however, that the error was harmless. The State, as the recipient of the constitutional error in this case, has the burden of demonstrating that the error was harmless beyond a reasonable doubt.[6] *Chapman v. California,* 386 U.S. 18, 24 (1967). With regard to constitutional errors

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[4] The entire opening and closing arguments of the State are so contaminated by such argument that citing each instance without citing almost the entire argument is impossible.

[5] The reference also seems to be to the prosecutions' unsworn testimony that suggested that certain witnesses may have made statements to him implicating King although no one, not even the prosecutor, so testified; nor were any such statements ever given to King in discovery. This line of argument may be to the "didn't you tell" me line of questioning which King has addressed as improper in another proposition.

[6] Where a defendant is convicted on the basis of unreliable hearsay evidence, his Fourteenth Amendment due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation are violated. Unreliable statements do not satisfy the constitutional demands for

that have an impact on an accused's right to a fair trial, this Court has long held that reversal is required unless it can be said with confidence that the error had no harmful effect upon the jury. *Coleman v. State*, 198 Miss. 519, 23 So.2d 404 (1945). What this means is that where the evidence of the guilt is not so overwhelming that no fair-minded jury could have reached a not guilty verdict, then the case must be reversed. *McDonald v. State*, 285 So.2d 177, 179 -180 (Miss. 1973) ["One of the ingredients of a fair and impartial trial is that an accused person should be tried upon the merits of the case"]. *See also, Murphy v. State,* 453 So.2d 1290, 1294 (Miss. 1984), where the wrongfully admitted hearsay itself would have been enough to convict the accused, this Court reversed and remanded for a new trial.

Apparently recognizing without stating that it has the burden to show that the evidence was so overwhelming that without the complained of evidence, no reasonable jury could have reached a verdict other than guilt, the State lists certain evidence which is claims overwhelmingly demonstrates King's guilt. In an effort to make the evidence seem more than it is, the State divides the list into twelve different items of evidence or testimony. Appellee's Brief, p. 12.

Broken down into their essentials, however, they include such "facts" as the pathologist ruled the death a homicide. Appellee's Brief, p. 12. "Projectiles and cartridges were found at the scene." *Id.* Witnesses were reluctant to give information. *Id.* While those particular pieces of evidence show King was the shooter the State neglects to say. What they demonstrate is that someone shot Brooks.

When shorn of the verbiage, the only evidence which the State points to which even remotely incriminates King is that King was at the shop next door 10-15 minutes prior to the crime; the shooter came not from the shop but from that direction and King may or may not have had a motive to shoot Brooks since Brooks did not in fact shoot his uncle. The only other evidence incriminating King came from Summers' prior unsworn out-of-court statement he made after he had given a contrary statement.

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admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990).

In that statement Summers may have identified King in a photo lineup as the shooter. Appellee's Brief, pp. 11-12.

Why anyone with a demonstrable intelligence quotient would believe Summers' statement without the inflammatory, irrelevant evidence, the State does not say—possibility because there is not a reason in the world why any reasonable juror would in fact credit it without other compelling corroborating evidence. Summers was 16 at the time he gave the statement; it was inconsistent with his first prior statement, the incriminating statement came after he was picked up, questioned without his guardian and threatened with prosecutions as an accessory to murder if he did not "tell the truth" and incriminate King [7] Summers repudiated that statement under oath in a statement to King's attorney; Summers testified at trial at first consistent with the repudiation. It is abundantly apparent from a reading of Summers' trial testimony that he is not bright and easily suggestible. Moreover, to say that his various stories are inconsistent is an understatement of colossal proportions.

This Court has frequently commented that the testimony of a witness who has been impeached with inconsistent statements is seriously devalued. In fact, this Court has even reversed cases where the defendant was convicted on testimony of a witness that was "full of inconsistencies, overly vague, and almost completely uncorroborated. *E.g., Feranda v. State,* 267 So.2d 305, 305 (Miss. 1972). Here, the only possible corroboration was that King, along with numerous other people who were hanging out in the vicinity, may have been near the scene near the time of the shooting and may, or may not,[8] have had a motive to shoot Brooks.

That being said, no witness identified King as the shooter—ever, in-court or out-of-court. In fact, Derrick Fields positively identified the shooter as someone else and did so despite numerous attempts by police and the prosecution to get him to, as the prosecution described it, "tell the truth." Without the

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[7] By this time police had decided that King was the shooter and were picking up and threatening witnesses who did not identify King with prosecution.

[8] As it turned out, Brooks apparently did not shoot King's uncle. Monkey did.

offending testimony, argument and so forth, a reasonable jury could well reject Summers' testimony and conclude that proximity was insufficient to find King guilt. The State, therefore, has failed to shoulder its burden of showing the errors to be harmless beyond a reasonable doubt.

In a related, but equally dubious argument, the State also argues that the instruction which the judge gave at the close of the evidence telling the jury that the prior inconsistent statements were impeaching only cured any problem in the admission of the prior statements. The problem with this argument, however, is that this Court has repeatedly opined that such instructions are unlikely to cure error in the admission of such prior inconsistent statements when the evidence is extensive or confusing or the evidence is weak. *Moffet v. State, supra; Wilkins v. State, supra.* In this case, the way in which the statements were introduced is so confusing that it would have been impossible for a jury to make the distinction.

Moreover, the instruction did not cure the defect because the trial court even over defense objection repeatedly allowed the prosecution to argue that the jury should misuse the evidence. *See argument in following Proposition III in this and King's initial brief.* Without dwelling on the problem in too much detail since King discusses it later, when King's attorney attempted to argue that the statements could not be used as evidence of King's guilt, the prosecution objected on the ground that the language was not a correct statement of the law. The trial judge sustained the objection thus leaving the jury with the distinct impression that they could, as the prosecution repeatedly told them to do, use the statements to infer that King was guilty.[9] Under these circumstances, there is no way the jury could have had a clue about what the proper use of the evidence was.

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[9] For example, Knott argued that the out of court statements could not be considered for the truth. The prosecution objected and stated "I object. **That is not what the instruction says.** He needs to read the instruction as it is, and **it does not say it cannot be used as evidence of guilt** [emphasis added]." **"It does not say the guilt.** It does say as you read it is correct." Tr. 1105 [emphasis added]. The judge agreed with the prosecutor. Knott then argued: "The out of court statements cannot be considered as evidence of the truth." The prosecution again objected: "He just said it again. He said the out of court **statements cannot be considered as evidence of the truth** period. **That's not what it says**, Your

When, as here, the prosecutor, not only repeatedly misstates what the evidence of the prior inconsistent statements was, but time after time tells the jury they can use that evidence substantively, even a well-instructed jury would "have had a difficult chore distinguishing between the substantive and impeachment evidence." *Brown v. State,* 755 So.2d at 341. *See also, discussion of the history of Rule 607 in Wilkins v. State, supra* at 319 [permitting a jury to hear such testimony and then instructing it not to consider it except for "impeachment" has been called by one scholar "a pious fraud." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv.L.Rev. 177, 193 (1948)]. Here that task would have been impossible for the jury. It is virtually impossible even with a written record as present counsel can attest.

As Courts around the country have repeatedly noted, the impact of a prosecuting attorney's remarks must be particularly scrutinized, since, as Fifth Circuit Court of Appeals Judge Godbold succinctly pointed out in *Hall v. United States*, 419 F.2d 482, 583-84 (5th Cir. 1969), "great potential for jury persuasion . . . arises because the prosecutor's personal status and his role as a spokesman for the government tend to give to what he says the ring of authenticity. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says."

Indeed this Court has stated: "[t]he very necessity for repeated admonitions in itself may, to some extent, at least, emphasize the objectionable matter which the jury, of course, has already heard, and fix it more firmly in the minds of the jurors." *Sumrall v. State*, 272 So.2d 917, 919 (Miss. 1973). Where, as here, the prosecution misinforms the jury about the law,[10] and when challenged, that the court then reinforces misstatement, the error is particularly egregious. *United States v. Bohle*, 445 F.2d 54, 71 (7th Cir. 1971) [misstatement by prosecutor is "prejudicially erroneous where the jury is misinformed

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Honor. He left off half of the instruction [emphasis added]." The trial court instructed Knott to "just read the instruction." Tr. 1105.

[10] *See, Moffett v. State,* 456 So.2d 720, in which the Court noted that an instruction could not cure the error in admitting the prior inconsistent statement where the issue was crucial and where the prosecutor argued the use of the statement as substantive evidence.

concerning what it can consider on the critical issue of a case and that misinformation is reinforced by the court after the defendant challenges its accuracy"]. The notion, therefore, that an instruction that the prosecution never adhered to could cure the error is insupportable.

"Incompetent evidence, inflammatory in character, when presented to a jury carries with it a presumption that it was harmful . . . . [This Court] will reverse a conviction unless it can be said with confidence that the inflammatory material had no harmful effect upon the jury." *Tudor v. State,* 299 So.2d 682, 685 -686 (Miss. 1974).

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING KING'S REQUEST FOR A JURY INSTRUCTION AT THE TIME THE IMPEACHING STATEMENTS WERE ADMITTED.

King requested that the trial judge instruct on the proper use of prior inconsistent statements at the time they were admitted. The judge declined to do so. Tr. 53, 89. The State contends that King did not request such an instruction; therefore, he is procedurally barred. However, an objection or request is sufficient if it alerts the judge to the issue or the rationale is obvious from the context. For example, in *Randall v. State,* 806 So.2d 185, 196 (Miss. 2001), the Court stated that generally in order to preserve an error, the matter must be presented in such a way that the trial judge can rule on it. The Court went on to say, however, that "where an objection is made and where the basis therefore is obvious from the context, little of value is accomplished by insistence upon a technically correct objection."

Even if the counsel's request is deemed insufficient to preserve this error, "this Court has recognized an exception to procedural bars where a fundamental constitutional right is involved [citation omitted]. "The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and the state constitutions." *Id.* at 196-97.

Finally, where counsel has forfeited an issue which would be meritorious and which strategically would have no advantage for the defendant, this Court should recognize that counsel has been constitutionally ineffective and notice an otherwise forfeited error on direct appeal. *Holland v. State,* 656

So.2d 1192, 1199 (Miss. 1995). Consequently, this Court can and should review the issue of the trial court's failure to give a limiting instruction at the time evidence was admitted under the theory that counsel sufficiently drew the court's attention to the need for an instruction or his failure to do so was ineffective; or the failure to instruct constituted plain error.

First, as to the request, King specifically stated to the trial judge in discussing the admissibility of the prior inconsistent statements:

> He [Stanley Alexander] wants to go against what the Supreme Court has said that the circuit judges must do. It says here exactly, we also hold that under the unfair prejudice, confusion of the issues or misleading of the jury provision of 403, **the circuit judge should consider whether a cautionary instruction to the jury would be sufficient to keep the jury from treating the unsworn pretrial inconsistent statement as substantive evidence.** And if not, the statement should not be introduced [emphasis added].

Tr. 85. *See also,* Tr. 53 where counsel made the same argument stating "the circuit judge should consider whether a cautionary instruction to the jury would be sufficient to keep the jury from treating the unsworn pretrial inconsistent statement as substantive evidence." That counsel may have been reading from a case as authority does not mean that the issue of a limiting instruction was not called to the attention of the trial judge. Moreover, the cases cited by King throughout the numerous arguments in the trial court against admission call for a limiting instruction. Counsel alerted the trial judge at least twice to the need for a cautionary instruction at the time of the admission of the evidence. *Randall v. State, supra.*

Alternatively, the use of hearsay evidence as substantive evidence implicates the fundamental constitutional rights of confrontation and cross-examination and a fair trial and the failure to *sua sponte* instruct when the issue was so hotly litigated and the issue of the limited use of the evidence was obvious. *Idaho v. Wright, supra.* As this and other courts have observed, it might be wise for the trial judge should give a cautionary instruction when such evidence is admitted. *Id. See, Brown v. State,* 755 So.2d at 1280 [court could give an instruction on limited application of the evidence]; *Harrison v. State,*

534 So.2d 175, 179 (Miss. 1988) [trial judge could *sua sponte* instruct]; *Bailey v. State,* 952 So.2d at 238.[11] If the need to instruct was not obvious in the instant case, it would never be obvious in any case. Not even the trial judge or the prosecution team understood what had been admitted for what.

Although it is true that the judge gave an instruction at the end of the trial, too much confusing testimony had been admitted by that time. Furthermore, as King pointed out in his initial brief, the prosecution misused that instruction (with the trial court's approval) to mislead the jury about how it could use the evidence. Because of the prosecutor's misstatements and the trial judge's erroneously sustained the prosecution's objections to King's arguments on the specific ground that King was misstating the proper use of the prior inconsistent statements, the jury was left with the distinct impression that the statements could in fact be used in determining King's guilt.

For example, Knott argued that the out of court statements could not be considered for the truth. The prosecution objected and stated, "I object. **That is not what the instruction says**. He needs to read the instruction as it is, and **it does not say it cannot be used as evidence of guilt** [emphasis added]." "**It does not say the guilt**. It does say as you read it is correct." Tr. 1105 [emphasis added]. The judge agreed with the prosecutor. Knott then argued: "The out of court statements cannot be considered as evidence of the truth." The prosecution again objected: "He just said it again. He said the out of court **statements cannot be considered as evidence of the truth** period. **That's not what it says**, Your Honor. He left off half of the instruction [emphasis added]." The trial court instructed Knott to "just read the instruction." Tr. 1105.

There can be no doubt that a limited instruction at the time the evidence was admitted should have been given and that the failure to do so was not harmless beyond a reasonable doubt.

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[11] The case of *Russell v. State,* 607 So.2d 1107, 117 (Miss. 1992) cited by the State for the proposition that no *sua sponte* instruction is ever appropriate is inapposite. In that case, the defendant did not object at trial to the statement going into evidence as impeachment evidence; nor did he request a limiting instruction at any time, so the trial judge was never alerted that there was any issue at all involving impeachment vs. substantive use of the statement.

IV. OTHER PROSECUTORIAL MISCONDUCT EITHER INDIVIDUALLY OR CUMULATIVELY REQUIRES REVERSAL BECAUSE KING WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND THE RIGHT TO PRESENT AND DEFENSE AND CONFRONT WITNESSES.

The state mistakenly argues that King is procedurally barred from raising the issue of prosecutorial misconduct because he did not raise the issue in his motion for new trial. Specifically, this Court has held that

> [r]egarding preservation for review, Mississippi statutory law holds, "Exceptions and bills of exceptions shall be necessary only when it is desired to preserve exceptions to some ruling or decision of the court which would not otherwise appear of record." If an appellant raises for review an issue **not raised in the pleadings, transcript, or rulings**, the appellant must have preserved the issue by raising it in a motion for new trial. *Jackson v. State*, 423 So.2d 129, 131 (Miss.1982) (citing Colson v. Sims, 220 So.2d 345, 346 n. 1 (Miss.1969)); *Griffin v. State*, 495 So.2d 1352, 1353 (Miss.1986). The rationale for this rule is based on the policy of giving the trial judge, prior to appellate review, the opportunity to consider the alleged error. *Cooper v. Lawson*, 264 So.2d 890, 891 (Miss.1972) (citing *Clark v. State*, 206 Miss. 701, 39 So.2d 783, suggestion of error overruled 206 Miss. 701, 40 So.2d 591 (1949)); *Howard v. State*, 507 So.2d 58, 63 (Miss.1987) [emphasis added].

Collins v. State, 594 So.2d 29, 35-36 (Miss. 1992).

In *Nash v. State,* 253 Miss. 715, 721, 178 So.2d 867, 869 (1965), the Court specifically rejected the state's argument that a defendant waives an issue (other than sufficiency of the evidence) by not raising it in a motion for new trial. In that case, the state contended that the appellant had waived an issue by not raising it in his motion for new trial. The Court, however, held that it was not necessary that the defendant include an issue that had already been objected to in order to preserve it for appellate review. Specifically, the Court noted:

> [t]he state cites in support of this contention the case of *Richburger v. State*, 90 Miss. 806, 44 So. 772 (1907). An examination of this case reveals that it did so hold, and that it has never been specifically overruled by a decision of this Court. However, the rule announced in this case was abrogated by Mississippi Code Annotated section 1639 (1956), and by the rules of this Court. Rule 6(3) of our former rules provided that **the right of review is not dependent upon filing of a motion for a new trial in the trial court**. This paragraph was deleted from the rules adopted by us on September 29, 1964,

> but it was not our intention to in anywise nullify or change this rule. **It had become so firmly established by statute and decision that we did not deem it necessary to retain it any longer as a rule of this Court. See Miss. Rule 6(3) (1952); Miss. Rule 6 (1964)** [emphasis added].

Id.

Moreover, even if the defendant did not specifically object to each and every instance of prosecutorial misconduct, this Court has repeatedly considered prosecutorial overreaching "in cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, [even where] objections were made and sustained, or . . . no objections were made"]. *Smith v. State,* 457 So.2d at 333-34.

To cite but one example where the Court has not invoked the procedural bars in cases of repeated prejudicial conduct, in *Tudor v. State,* 299 So.2d at 685-86, the Court noted in reversing the case for prosecutorial misconduct:

> Appellant's counsel failed to object to some of the above matters, objected to others with the objection being sustained, and in some instances the court instructed the jury to disregard the testimony. In other instances, the objection was overruled and the evidence admitted. Some of the errors were more serious than others and although some of them may not alone constitute reversible error, we have no hesitancy in finding that a combination of all of the above deprived the appellant of his due process right to a fair and impartial trial. Incompetent evidence, inflammatory in character, when presented to a jury carries with it a presumption that it was harmful.

In any event, the state cites to only a few of the instances of prosecutorial misconduct complained of by King that King did not object to. In fact, King objected to most of the misconduct of the prosecutor.[12] In any event, this case is so replete with egregious misconduct that this Court should view the unobjected to instances together with the objected to instances and find reversible error.

Certainly, the prosecution's repeated use of impeachment evidence as substantive evidence was objected to repeatedly and was error. Standing alone, those examples were reversible. The same is true of the prosecution's line of questioning where he acted as an unsworn witness in introducing hearsay

[12] As one court put it, once a court has made a definitive ruling on an issue, requiring a defendant to reobject elevates form over substance. *United States v. Harrison,* 296 F.3d 994, 1002 (10th Cir. 2002).

about what he and the witnesses had discussed in out of court conversations. King also objected to the prosecution's "heard on the streets" evidence as hearsay, and there can be no doubt that the only reason the prosecutor persisted in putting prejudicial hearsay before the jury was to prejudice them against King.

The prosecutor repeatedly misstated evidence. For example, at one point, the prosecutor said all the witnesses said Sean King killed Brooks. Alternatively, the prosecutor argued that the jury should convict King because the witnesses lied when they did not incriminate King because they were scared of King. Tr. 1124.

The State dismisses all of the misconduct as hasty observations made in the heat of debate. Alternatively, it asks this Court to excuse it because the Court gave a general cautionary instruction that what the prosecutor said was not evidence. The problem here, however, is that it is doubtful that any instruction was sufficient to erase the impact of the prosecution's repeated misconduct. For example, in a far less egregious case than this, the Sixth Circuit found plain error where the prosecutor misstated evidence and disparaged defense counsel. There, too, the Court had given a cautionary instruction that argument was not evidence. In finding substantial prejudice and thus plain error, the Court stated:

> At the outset, we note our belief that the prosecutor's misstatement regarding Halliburton's testimony was inherently prejudicial to Carter. This court has consistently recognized that a prosecutor's misrepresentation of material evidence can have a significant impact on jury deliberations "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Washington*, 228 F.3d at 700; see also *United States v. Solivan*, 937 F.2d 1146, 1150 (6th Cir.1991) (Because jurors are likely to "place great confidence in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or suggestions [by the prosecutor] are apt to carry [great] weight against a defendant" and therefore are more likely to mislead a jury.); *United States v. Smith*, 500 F.2d 293, 295 (6th Cir.1974).
>
> We note that defense counsel did not request any curative instruction. The only possibly relevant instruction given by the district court was an instruction that "objections or arguments made by the lawyers are not evidence in the case." [citation omitted] his instruction, however, was made along with all other routine instructions for evaluating the evidence presented at trial. Furthermore, the instruction was not given at the time of the improper comments . . . . We believe that measures more substantial than a general

> instruction that "objections or arguments made by the lawyers are not evidence in the case" were needed to cure the prejudicial effect of the prosecutor's comments during closing arguments.

United States v. Carter, 236 F.3d 777, 787-88 (6th Cir. 2001).

In the instant case, the misconduct was far more pervasive and substantial. Because the misconduct implicates the accused's constitutional rights to due process, confrontation, cross-examination and a fair trial, the burden is on the state to show they were harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967). The evidence in this case was far from overwhelming. Even if each error is not reversible standing alone, this Court should view the prosecution's misconduct cumulatively and reverse this case.

V. THE PROSECUTION COMMITTED PLAIN ERROR IN COMMENTING ON KING'S FAILURE TO CALL HIS WIFE AS A WITNESS THEREBY COMMENTING ON THE ACCUSED'S SILENCE.

King initially argued that the prosecution committed plain error when it commented on King's failure to call his wife to testify. The State first argues that the error was not "plain" because neither trial counsel for King nor the trial judge "notice[d] the alleged error." Appellee's brief, p. 20. The test for whether an error is plain error is not whether or not anybody noticed it; otherwise, there could never be a finding of plain error. If counsel had noticed it and objected to it, then there would be no need to have a doctrine of "plain error." An error is "plain" within the meaning of the "plain error" rule is it deviates from a legal rule.

This Court, for example, recently found plain error where the defendant failed to specifically object to a *Batson* violation on the ground raised on appeal. *McGee v. State*, 953 So.2d 211 (Miss. 2007). To determine if plain error has occurred, this Court stated, "we must determine 'if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial.' *Cox v. State*, 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v.*

State, 584 So.2d 786, 789 (Miss. 1991); *Porter v. State*, 749 So.2d 250, 260-61 (Miss.Ct.App. 1999))." In *McGee,* the Court stated that the error was "plain" because it did indeed "deviate[] from sound precedent. [citations omitted]." *Id.* at 215. Because the deviation in McGee's case violated his equal protection right to a gender-neutral jury, the Court found that his substantial rights had been violated and reversed.

In his initial brief, King showed that this Court has held on numerous occasions that the prosecutor may not comment on the failure of the accused's wife to testify. In fact, as early as 1939, this Court that "this principle is now so well established, by decisions of this Court too numerous to quote from and discuss here, that it should no longer be necessary to call attention again and again to the impropriety and prejudicial effect of comments upon the failure of the wife of the accused to testify in his behalf, or upon the inability of the State to use her as a witness." *Russell v. State*, 189 So. 90, 92 (Miss. 1939).[13] It follows, therefore, that the prosecution's comments deviated from well-established legal rules. Therefore, this Court can consider the second part of the test for plain error--whether the error violated the defendant's substantial rights.

As for whether the prosecution's misconduct violated King's substantial rights, this Court noted in *Outlaw* that where the case was close the misconduct warranted a new trial "[s]ince every man is entitled to a fair and impaired trial by a jury uninfluenced by anything except competent evidence, and since all reasonable doubts should be resolved in favor of the defendant . . . ." *Id.,* 208 Miss. at 20, 43 So.2d at 664-665.

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[13] *See also,* "We seriously doubt that there is a prosecuting attorney in this state who does not know this to be the law. A violation of this salutary rule by a prosecuting attorney must be interpreted as motivated by a desire to prejudice the jury against a defendant and tip the scales against him in a close case such as is here presented, with the hope that this court will say on appeal, as it did say in some of the foregoing authorities, that the defendant has been proven guilty notwithstanding the error, and that consequently the error will be held harmless." *Outlaw v. State* 208 Miss. 13, 20, 43 So.2d 661, 664 (Miss.1949). In *Outlaw*, over objection, the prosecutor asked the defendant if he would object if his wife testified.

In *Cole v. State,* 21 So. 706, 707 (Miss. 1897),[14] where, as here, the evidence is inconclusive, the Court found plain error and reversed Cole's conviction because the district attorney commented on his failure to call his wife. The Court stated: "This legal privilege the law gives him, and the court which tries him is under the duty of securing to him, unimpaired by such adverse comment, to the end that he have a fair and impartial trial."

Similarly, in reversing this Court in *Johnson v. State*, 63 Miss. 316, 317 (Miss. 1885), stated regarding the importance of the rule in preserving privacy and in insuring a fair trial:

> If the failure of the husband to call his wife as a witness in his behalf is to be construed as testimony, or as a circumstance against him, his privilege and option in the matter would be annulled, and he would be compelled, in all cases, to introduce her, or run the hazard of being convicted on a constrained, implied confession or admission, or to make explanations for not introducing her which might involve the sacred privacy of domestic life.

Because this Court has held that the violation of the marital privilege rule also implicates an accused's constitutional right not to testify, it might be useful to note that this Court has also frequently found plain error because a violation of this right. *E.g., Griffin v. State* 504 So.2d 186, 193 (Miss.1987); *Stringer v. State*, 500 So.2d 928, 940 (Miss.1986); *West v. State*, 485 So.2d 681, 688 (Miss.1985).

Whether this Court should find plain error in King's case, ultimately depends on whether the error affected King's substantial rights and prejudiced him at trial. Plainly it did because it called upon the jury in a case where the evidence was extraordinarily weak to find King guilty for a totally improper reason: because his wife did not testify and because he could not explain why without testifying.

The State counters, however, that King cannot complain of the error because its comment on the failure of King and his wife to testify was justified as a response to King's argument that Detective Richardson testified that when questioned, Mrs. King, before he had stated anything about a murder, said "I was driving the vehicle that week." Appellee's Brief, p. 19. According to the State, it was

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[14] Although *Cole* does not discuss the absence of objection, the case of *Johnson v. State,* 47 So. 897, 897 (Miss. 1909), another case reversing for adverse comment on the failure to call the wife, the Court notes that in *Cole,* there was no contemporaneous objection.

therefore appropriate for the State to violate King's Fifth Amendment rights by commenting on King's failure to call his wife to testify at trial. *Id.*

The State's argument is not well taken. The doctrine of invited error or curative admissibility allows the State some leeway in its response when a defendant makes an improper argument or asks an improper question. The scope of the response, however, may not exceed the invitation extended. In *Blanks v. State*, 547 So.2d 29 (Miss. 1989) for example, the defendant stated he had never fired the murder weapon. On cross-examination, the prosecuting attorney asked about a prior instance in which the accused was said to have quarreled with a friend and in which he "had gotten the pistol out, waved it and threatened to shoot ... [the friend]." *Id.*, at 37. The Court condemned this line of inquiry on grounds it impermissibly exceeded the scope of direct examination. Because the cross-examination sought to impeach-rather than elicit relevant admissible testimony-the prosecution's scope was limited to what was said on direct. *See also, Stewart v. State,* 596 So.2d 851, 852-854 (Miss. 1992) [again reversing because the state's response exceeded the invitation].

Evidence is permitted under the doctrine of opening the door or curative admissibility only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence and is limited to evidence or argument relevant to an issue and within the scope of the original evidence or argument. *Id; United States v. Brown*, 921 F.2d 1304, 1307 (D.C.Cir. 1990); *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982).

As the D.C. Circuit has put it,

> Even if defense counsel had opened the door by questioning Wilson about his notes and challenging his credibility, it does not follow that **all** subsequent evidence is admissible. As this court has long recognized: "'Opening the door is one thing. But what comes through the door is another.'" *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971). "Introduction of otherwise inadmissible evidence under shield of [curative admissibility] is permitted 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'" [citation omitted].

United States v. Brown, 921 F.2d at 1307; *Stewart v. State*, 596 So.2d at 854 [the trial court "'let through the door' a truck far larger than the law allows"].

There are several problems then with the State's application of that doctrine here. First of all, the State made the initial reference to Mrs. King in its initial closing argument. Specifically, the State argued:

> Which is interesting to note that Ricky Richardson tells you he went to go talk to her. And at first she says, you know, I was driving that car all week. And when he said, well, Ms. King, I want to let you know this is concerning a murder investigation, well, I'm not talking to you anymore. Isn't that interesting.

Tr. 1100.

In response to the prosecution's suggestion that Mrs. King's invocation of her right to not talk to the police was "interesting" and the dubious exhortation to the jury that it should draw an adverse inference against King based on it, King's attorney argued:

> Detective Richardson before mentioning anything about the murder to [the defendant's] wife, before she knew anything about the murder, said, I was driving the vehicle that week. And then he started talking about a murder. Said, wait a minute. Wait a minute. Of course, you're going to stop and say, wait a minute. You're suspecting me of a murder. She says, I was driving the vehicle that week. There is no evidence to dispute that.

Tr. 1119-20.

The prosecution then responded:

> He talked about Latonya King saying, I was driving it all that week until h e mentioned murder. Did she take the stand? I may have dozed off, but I don't recall her sitting in this stand and saying anything.

Tr. 1132.

The State claims this response was necessary to redress King's misstatement about what King's wife had testified to. King's attorney, however, did not say that King's wife testified to those facts. He said Detective Richardson said that she had said that—which is a correct statement of what occurred during Richardson's testimony.

Under the doctrine of curative admissibility, the State's response to an improper argument that Mrs. King had not said X could have gone no further than necessary to show that she had not said X. It could not go further and call the jury's attention to her failure to testify. Asking the jury to draw an adverse inference because she did not testify does not address anything improper about what she told Richardson even if the defendant's attorney had misstated what she said.

The State contends, however, that all the State was doing was pointing out that the defendant had put on no direct evidence that Mrs. King had made the statement. That, however, is exactly what the problem is. The defendant was not required to put on direct evidence by calling Mrs. King, and the State is not allowed to comment on that fact.

In short, the State's response was not limited to addressing any purported inaccuracy in the argument but was an invitation to the jury to convict King because he did not call his wife to testify or failed to offer an explanation as to why he did not do so.[15] Because the rule against commenting on the defendant's failure to call his wife is so well established, the violation of the rule was plain. *Johnson v. State,* 63 Miss. 313, 1885 WL 3071 (Miss. 1885). *Accord, Simpson v. State,* 497 So.2d 424, 428 (Miss. 1986); *Cole v. State,* 75 Miss. 142, 21 So. 706 (Miss. 1897).

The error implicates the Fifth Amendment privilege against self-incrimination.[16] Such errors are particularly egregious because they impinge on a fundamental constitutional right of the accused. No person ... shall be compelled in any criminal case to be a witness against himself, ... U.S. Const. Am. 5.; *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

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[15] That this was the prosecution's intent is shown by its follow up comments about what King might say when he made closing arguments" "And you know, I don't really know what he's going to say **because we didn't ever hear an opening statement**, so we don't really know what the defense theory is going to be. I'm not sure if it's going to be Sean King was there and that he left before the murder or that Sean King was never there . . . ." Tr. 1100-01. Taken together, the jury most certainly drew the inference that King's failure to testify or put on a defense was reprehensible.

[16] Not only do such comments violate the marital privilege, they also implicate the Fifth Amendment privilege against self-incrimination because they call upon the defendant to testify "to make explanations for not introducing her. . . ." *Cole v. State,* 75 Miss. 142, 21 So. 706 (Miss. 1897).

Given that the only evidence even arguably directly implicating King came from the much-impeached prior unsworn statement of Clifton Summers, the evidence likely had an injurious effect on the jury's deliberations. Importantly, it infringed on a substantial constitutional right of the accused. This Court has repeatedly considered prosecutorial overreaching "in cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, [even where] objections were made and sustained, or . . . no objections were made." *Smith v. State,* 457 So.2d at 333-34; *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988) [even an unobjected to error can still enter the court's calculus of whether the defendant was prejudiced by other errors]. At the very least then, the Court can consider this error along with other prosecutorial misconduct and court errors alleged in other propositions in determining if King received a constitutionally mandated right to a fair trial. *Smith v. State, supra.*

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING EVIDENCE SHOWING THE BIAS OF THE WITNESSES THEREBY DENYING KING HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION, RIGHT TO PRESENT A DEFENSE AND RIGHT TO A FAIR TRIAL.

Procedural bar is the principal argument that the State advances against reversal because the court excluded, at the prosecution's request, evidence that particular witnesses had been or could be charged with particular offense. The first procedural bar asserted is that of failure to raise the issue in the motion for new trial. As King previously discussed, he is not required to raise an issue, other than sufficiency, in his motion to a new trial.

The State next contends that the issue was never raised in the trial court in King's objections. The State again is wrong. At trial, the **State** objected to and successfully kept King from introducing evidence that at the time the witnesses made statements allegedly incriminating King, they faced the possibility that they might be charged with regard to the attempt to sell the stolen truck parts. Tr. 113, 350, 394. Moreover, at the time of the trial, some faced additional charges or had charges pending. Tr. 394. 520, 578, 638, 716.

To repeat, King proffered the testimony or asked the questions, it was the State, not King who objected to the admission of the evidence of pending and potential charges. The judge sustained the objection. *Id.* The State's argument is that the defendant's "objection on one specific ground waives all other grounds." Appellee's Brief p. 21. The defendant did not object; the state did. The State's authorities are inapposite.

Moreover, when King offered testimony regarding the witnesses' charges, the ground for admission was so obvious that the Judge would have to have been mentally defective to miss that the defendant was asking that the evidence be admitted to show bias. *See, Foster v. State,* 508 So.2d 1111, 1115 (Miss. 1987) [and cases cited therein at 1115], *overruled on other grounds, Powell v. State,* 806 So.2d 1069 (Miss. 2001). In *Foster,* the Court reversed because there, too, "the trial court, in ruling on the motion, failed to distinguish between impeachment by proving prior convictions or bad acts, and, on the other hand, impeachment by showing bias, prejudice or motive." Specifically, although the Court did allow testimony that the witness had been arrested, the Court refused to allow questioning as to his belief about any beneficial treatment while in jail. The Court reversed. *See also, Davis v. State*, 968 So.2d 948 (Miss. 2007) [reversing for failure to allow cross-examination regarding pending charges to show bias].

MRE Rule 609 provides that a witness' credibility may be impeached by conviction of a crime. Rule 609, however, is not the only way a witness may be impeached.[17] A witness may always be impeached for bias, prejudice or interest. *Hill v. State*, 512 So.2d 883, 884-885 (Miss. 1987). This right is embodied in MRE 616. "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness, *for or against any party to the case*, is admissible [emphasis added]. MISS. CODE ANN. § 13-1-13 (1972) also provides, that "[a]ny witness may be examined touching his

[17] The State cites the case of *Wilkins v. State,* 603 So.2d 309 (Miss. 1992) for the proposition that a witness cannot be cross-examined about crimes for which he has not been convicted. The State, as it did at trial, confuses impeachment pursuant to Rule 609 and impeachment for bias pursuant to Rule 616.

interest in the cause or his conviction of any crime, and his answers may be contradicted, and his interest or his conviction of a crime established by other evidence. A witness shall not be excused from answering any material and relevant question, unless the answer would expose him to criminal prosecution or penalty." This right to examine for bias or interest includes asking questions regarding arrests where the jury may infer that that the prosecution has the ability to influence the bringing of charges or the outcome of pending charges. *Davis v. State*, 970 So.2d 164, 169 (Miss.App. 2006), *cert. denied* 970 So.2d 164 (Miss. 2007).

All of the witnesses had charges pending or which could have been brought by the Hinds County District Attorney's office. The jury could have inferred from that that the witnesses could have believed that the prosecutor's office could influence the bringing or outcome of those charges. The trial court, therefore, erred in sustaining the prosecution's objections to questions regarding arrests. *See, e.g., United States v. Anderson,* 881 F.2d 1128, 1138, 279 U.S.App.D.C. 413, 423 (D.C. Cir. 1989) ["[t]he permissible scope of exploration on cross-examination is not curtailed by the absence of promises for leniency, for the defense may attempt to show government 'conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation'"].

In *United States v. Landerman,* 109 F.3d 1053 (5th Cir. 1997), the Fifth Circuit reversed because the district court incorrectly excluded evidence in a federal trial of a pending state charge because the witness testified that he did not believe his plea agreement would help him in state court if he gave favorable testimony in federal court. The Fifth Circuit held that "[t]hat determination, however, should not have been made by the district court. Instead, the jury, as the trier of fact, should have been allowed to draw its own inferences regarding Ottesen's credibility and determine what effect, if any, the pending criminal charge had on Ottesen's motivation to testify." *Id.* at 1063 *citing* the Supreme Court precedent of *Olden v. Kentucky,* 488 U.S. 227, 232 (1988) stating that speculation regarding prejudice caused by

harmful. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The prosecution argued that the witnesses were key to linking King to the murder. Thus, any additional incentive the witnesses might have to curry favor with the prosecution was material to the jury's ability to judge their credibility.

Because the error impacts a number of King's constitutional rights, including his rights to present a defense and cross-examine witnesses, the state, as the recipient of the error, has the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Chapman v. California, supra.* The state attempts to make the showing by arguing that evidence showed that the State could prosecute the witnesses if they did not tell what the prosecution deemed to be "the truth." That is not quite the same as the state having other charges already pending or probable cause at the time of the testimony to bring other charges, including being an accessory to murder. The State has failed to carry its burden of demonstrating that the error was harmless beyond a reasonable doubt.

VII. THE EVIDENCE IS SO WEAK AND UNRELIABLE THAT THE COURT SHOULD REVERSE THE CONVICTION.

The only direct evidence adduced by the State showing King shot Brooks came from an unsworn prior inconsistent statement of Summers. At trial, Summers denied that he saw King shoot Brooks. The rest of the witnesses, even in their prior inconsistent statements, failed to identify King as the shooter. In fact, Derrick Fields definitely stated both at trial and in his prior allegedly inconsistent statements that he saw the shooter, and King was not the shooter. Moreover, he identified someone else as the shooter. At best, aside from Summers' prior inconsistent statement, the remaining evidence puts King, along with a lot of other people, near the crime scene at some point prior to the crime and shows he may or may not have had a motive to shoot Brooks.

Significantly, the State cites only to Summers' testimony and the evidence placing King near the scene as evidence of his guilt. The State points to no witness who claimed he saw King shoot Brooks in his sworn trial testimony or indeed in one of the inadmissible unsworn prior statements. Neither does the

State attempt to distinguish any of the cases cited by King other than to generally argue that the jury can believe what it wants to.

As a general rule, that may be true. However, there comes a point when it becomes unreasonable for the jury to credit certain testimony. For example, a jury's verdict may be overturned when "from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind." *Thomas v. State,* 129 Miss. 332, 92 So. 225, 226 (1922).

King suggests that point has been reached here. As it has in previous cases, this Court should hold that Summers' evidence is so fraught with inconsistencies,[18] that the conviction should be reversed and rendered. At a minimum, the Court should grant a new trial.

VIII. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT KING WAS CONVICTED AND SERVED SEPARATE SENTENCES, AND HIS SENTENCE AS AN HABITUAL MUST BE REVERSED.

King will rely on his initial argument since the case relied on by the State is a case from the Court of Appeals Otis v. State, 853 So.2d 856 (Miss.App. 2003). King would maintain that under the Supreme Court cases cited in his brief, the state failed to prove that he had served two separate terms as required by the statute and for the offenses charged in the indictment.

CONCLUSION

Faced with no witnesses who were prepared to identify King in sworn testimony as the person who shot Brooks, the police department first threatened witnesses with prosecution if they "did not tell the truth" and implicate King. When this failed to produce much in the way of results other than a change by Clifton Summers in his statement, the prosecution embarked on a deliberate campaign to suggest to the jury through cross-examination that the witnesses who failed to identify King at trial had

[18] Since the State does not dispute any of the factual inconsistencies cited by King in his initial brief, King will not restate them here.

done so at some prior date to the police and some member of the prosecution team and were now so afraid of King that they would not do so at trial. This was done without introducing any evidence that this was the case and through hearsay testimony and inadmissible bad act testimony about King. This Court has long said that it will not tolerate such misconduct, and it should not do so here.

RESPECTFULLY SUBMITTED,
SEAN ANTONIO KING, APPELLANT

BY: _____
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellants, do hereby certify that I have this date mailed, by placing the original and three copies of the foregoing addressed to the Clerk of this Court at PO Box 249, Jackson, Mississippi 39205-0249 in United States Mail, first class postage prepaid, and a true and correct copy in the United States Mail, first class postage prepaid, to:

Honorable Stephanie B. Wood	Honorable Robert Smith	Honorable Swan Yerger
Office of the Attorney General	District Attorney	Circuit Court Judge
P. O. Box 220	P. O. Box 22711	P. O. Box 327
Jackson, MS 39205	Jackson, MS 39205	Jackson, MS 39205

This, the 21st day of February, 2008.

_____
JULIE ANN EPPS

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